

November 9, 2017

BY ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

**Re: *Ex Parte* Communication in: MB Docket No. 15-216 (Good Faith
Negotiation); MB Docket No. 10-71 (Retransmission Consent);
MB Docket Nos. 14-50, 09-182, 07-294, 04-256 (Local Media Ownership);
GN Docket No. 16-142 (ATSC 3.0)**

Dear Ms. Dortch:

Yesterday, the Independent Television Group (“ITG”) filed a letter regarding Media Ownership and ATSC 3.0.¹ ITG lauds the Commission’s draft orders in these proceedings, yet suggests substantial revisions to them that would both harm the public and render the draft orders more susceptible to legal challenge.

1. Media Ownership. The Commission proposes to allow applicants to “request a case-by-case examination of a proposed combination that would otherwise be prohibited by the Top-Four Prohibition.”² ITG argues that the Commission should either eliminate the prohibition altogether in small and medium markets or create a presumption in favor of consolidation in such markets.³

Conspicuously absent from ITG’s letter is any mention of the fact that the Commission has *already* found that such consolidation will cause retransmission consent prices to increase in

¹ Letter from Jack Goodman to Chairman Pai, MB Docket No. 14-50, 16-142 (filed Nov. 8, 2017) (“ITG Letter”).

² Draft Media Ownership Order ¶ 81. We have expressed our views and concerns with this proposal. *See* Letter from Michael Nilsson to Marlene Dortch, MB Docket No. 15-216 *et al.* (filed Nov. 3, 2017).

³ ITG Letter at 5.

all markets.⁴ Indeed, one ATVA executive pointed to consolidation in one of the *very smallest* markets leading to higher retransmission consent prices everywhere.⁵ ITG fails to explain why these findings are no longer valid or otherwise should not apply, regardless of market size.⁶

2. ATSC 3.0. The draft order provides that stations cannot assert must-carry rights in ATSC 3.0 signals “while the Commission requires local simulcasting”⁷—the duration of which will be “determine[d] in a later proceeding.”⁸ ITG worries that not providing stations with ATSC 3.0 must-carry rights “will frustrate and delay adoption [of ATSC 3.0] in small and medium markets.”⁹ It then suggests that the Commission “defer a decision on carriage rights” until after consumer equipment becomes available.¹⁰

We agree with draft order’s determination that “mandating any MVPD carriage of the 3.0 signal at this time would be antithetical to a voluntary and market-driven 3.0 deployment for all stakeholders.”¹¹ We would also reiterate our view that any such expansion of must-carry rights would be unconstitutional—and, indeed, could call the entire must-carry regime itself into question.¹²

⁴ *Amendment of the Commission’s Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd. 3351 ¶ 10 (2014) (“*Joint Negotiation Order*”) (“[J]oint negotiation among any two or more separately owned broadcast stations serving the same DMA will invariably tend to yield retransmission consent fees that are higher than those that would have resulted if the stations competed against each other in seeking fees.”).

⁵ Letter from Michael Nilsson to Marlene Dortch at 4, MB Docket No. 15-216 *et al.* (filed Oct. 25, 2017) (describing a quadropoly in Greenwood-Greenville, Mississippi).

⁶ See Letter from Michael Nilsson to Marlene Dortch at 5 MB Docket Nos. 15-216 *et al.* (filed Aug. 17, 2017), citing U.S.C. § 706(2)(A); *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 545–549 (1978); *Motor Vehicle Mfrs. Ass’n. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

⁷ Draft ATSC Order ¶ 67.

⁸ *Id.* ¶ 14.

⁹ ITG Letter at 6.

¹⁰ *Id.* at 7.

¹¹ Draft ATSC Order ¶ 67.

¹² See Reply Comments of the American Television Alliance at 11-12, GN Docket No. 16-142 (filed June 8, 2017) (explaining constitutional concerns with expanding must-carry rights). ITG also suggests that the Commission should not rely on its 2005 order denying must-carry rights to digital signals prior to the digital transition because broadcasters sought reconsideration of that order—even though the Commission dismissed the reconsideration petition. ITG Letter at 7. In ITG’s view, because the Commission dismissed the

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In accordance with the Commission's rules, I will file one copy of this letter electronically in each of the dockets listed above.

Respectfully submitted,



Michael Nilsson
Counsel to the American Television Alliance

reconsideration petition on procedural grounds, the legal issue resolved in the earlier order “remains open.” *Id.* This is wrong as a matter of law. 47 U.S.C. § 405 (“No [petition for reconsideration] shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission.”); *Valley Pub. Television*, 12 FCC Rcd. 22795 ¶ 12 (1998) (rejecting claim that it was “unfair” for the Commission to use as precedent an order subject to a petition for reconsideration).